SUPREME COURT, U. S.

JAN 22 1968

JOHN F. DAVIS, CLERK

No. 510

In the

Supreme Court of the United States

OCTOBER TERM, 1967.

MARVIN L. PICKERING,

Plaintiff-Appellant,

vs.

BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT 205, WILL COUNTY, ILLINOIS,

Defendant-Appellee.

On Petition for Writ of Certiorari to the Supreme Court of Illinois.

BRIEF OF DEFENDANT-APPELLEE

CIRRICIONE & PENN
32 West Van Buren Street
Joliet, Illinois 60431
Attorneys for Defendant-Appellee

JOHN F. CIRRICIONE
Of Counsel

The Scheffer Press, Inc.—ANdover 3-6850

TABLE OF CONTENTS

	PAGE
Statement as to Jurisdiction of Court	1
Questions Presented For Review	3
Statement of Facts	3
Summary of School Board's Arguments	4
Preface	
I. Brief Analysis of Illinois School Management and Finance Law	5
Argument	
I. There was Sufficient Cause for Plaintiff's Dismissal Under the Illinois School Code	10
A. The Published Statements of the Teacher Were False or Recklessly Made	10
B. That the Statements Were Not Remediable	12
C. False Statements Knowingly or Recklessly Made Are Not Constitutionally Privileged When the Statements Published can be Reasonably Said to be Detrimental to the Best Interests of Schools	13
II. Chapter 122, Section 10-22.4, Illinois Revised Statutes (1963), which Provides that a Board of Education May Dismiss a Teacher Whenever in its Opinion the Best Interests of Schools Require It, Is Not Unconstitutional as being Vague and Indefinite When Applied to First Amendment Rights	15

PAGE

III. The Hearing Afforded the Teacher Did Not Violate Due Process 18

A. Issue Not Raised in Lower Courts 18

B. The Teacher Was Accorded A Fair Hearing 20

Conclusion 22

TABLE OF AUTHORITIES

CASES:

Adler v. Board of Education, 342 U.S. 496; 372 S. Ct. 386 2

Batcholor v. U.S., 1965, 196 Ct. Cl. 180; Certiorari Denied, 86 S. Ct. 147; 382 U.S. 870 9

Board of Education v. Swan, 41 Cal. 2d 546; 261 P. 2d 261, Cert. Denied, 347 U.S. 937; 98 L. Ed. 1087; 74 S. Ct. 627 (1954) on page 266 of Pacific Reports, 2nd Series 17

In re Coates, 9 N.Y. 2d 242; 173 N.E. 2d 797 (1961) 21

Dohany v. Rogers, 281 U.S. 362, 369; 50 S. Ct. 299, 302 (1930) 21

Donahoo v. Board of Education, 413 Ill. 422; 109 N.E. 2d 787 (1952) at page 789 ..... 8, 19

Houston v. U.S., 297 Fed. 2d 838, Cert. Denied; 83 S. Ct. 204; 371 U.S. 906 (1962) 9, 14

Jepson v. Board of Education, 19 Ill. App. 2d 204; 153 N.E. 2d 417 (1958) 9, 13

Keyes v. Board of Education, 20 Ill. App. 2d 504; 156 N.E. 2d 763 (1959) 9

Keyishian v. Board of Regents, 87 S. Ct., 675 at page 679 (1967) 2, 15

PAGE

Krennrich v. United States, 340 Fed. 2d 653 at page 654, Cert. Denied 86 S. Ct. 147; 382 U.S. 870 (1965) 11

Leonard v. Douglas, 321 Fed. 2d 749, at page 752 (1963) 17

Miller v. Board of Education of District No. 132, 51 Ill. App. 2d 20, 41; 200 N.E. 2d 383, First District (1964) 2

STATUTES:

Illinois Revised Statutes (1963):

Chapter 122, Section 24-12 ..... 1, 3, 4
Chapter 122, Section 10-22.4 ..... 2, 3, 8, 22
Chapter 122, Section 9-5 3
Chapter 122, Article 9 5
Chapter 122, Articles 3 and 4 5
Chapter 122, Section 24-8 7
Chapter 122, Article 10 7
Chapter 122, Section 24-16 8

United States Code Annotated,

Title 5, Sec. 7501 16
Title 5, Sec. 7512 16

Introduction to School Code 1961, Page VII, Vol. 1, Chapter 122 Smith-Hurd Annotated Statutes 5

IN THE

SUPREME COURT OF THE UNITED STATES

No. 510

OCTOBER TERM, 1967.

MARVIN L. PICKERING,

Plaintiff-Appellant,

vs.

BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT 205, WILL COUNTY, ILLINOIS,

Defendant-Appellee.

On Petition for Writ of Certiorari to the Supreme Court of Illinois.

BRIEF OF DEFENDANT-APPELLEE

STATEMENT AS TO JURISDICTION OF COURT

The defendant school board admits that the issue of freedom of speech under the First Amendment and the Fourteenth Amendment were properly raised and preserved in the lower court, but states the fact to be that the plaintiff teacher did not raise the question of the constitutionality of Chapter 122, Section 24-12, which provides for a hearing by the same Board which dismissed the teacher. App. I, pages 6, 7, and 8, Complaint for Administrative Review, and App. I, pages 28 and 29, School

Board's Motion to make Paragraph 17-L of the Complaint for Review more specific, and plaintiff's specification thereto, App. I, page 32, and also see teacher's brief and argument in the Illinois Supreme Court; nor was the vagueness of Chapter 122, Section 10-22.4 raised in the initial reviewing court.

The first time the constitutionality of the Board's power to act as a tribunal was raised in the dissent of Justice Shaeffer, App. I, page 152. The issue of constitutional propriety of Louis Bertani to act as prosecutor as suggested in the brief of Amicus Curiae, pages 3 and 11, was never raised in this proceedings until suggested by the Amicus Curiae. The Complaint for Administrative Review and the briefs of the teacher in the Illinois Supreme Court were completely silent as to this point. The School Board herein states the fact to be that Louis Bertani was a specially employed attorney for the Board to prosecute on behalf of the Board and that John Verklan was the regularly employed School Board attorney, and acted as the Board's advisor in the original hearing before the Board. App. I, pages 86 and 87. This was done to avoid the rulings in *Miller* v. *Board of Education of District #132,* 51 Ill. App. 2d, 20, 41; 200 N.E. 2d, 383, First District 1964. The Complaint for Administrative Review made no request for the Appeal Court to rule upon the admissions and exclusions of evidence offered. It is therefore respectfully requested that this Court discard those portions of the teacher's brief and the brief of the Amicus Curiae as to those issues not raised in the Courts below. *Keyishian* v. *Board of Regents,* 87 S. Ct., page 679 (1967); *Adler* v. *Board of Education,* 342 U.S. 496, and 372 S. Ct., 386.

QUESTIONS PRESENTED FOR REVIEW

1. Can a public school teacher be dismissed by the School Board when the teacher publishes a letter in a newspaper which contains false and misleading statements criticizing the School Administrator and the School Board?

2. Is that part of Chapter 122, Section 10-22.4, Ill. Rev. Stats. (1963) which provides that a Board of Education may dismiss a teacher whenever "in its opinion the best interests of schools require it", unconstitutional as being vague and indefinite when applied to First Amendment rights?

3. Is Chapter 122, Section 24-12, Illinois Revised Statutes (1963) unconstitutional in that it fails to accord a fair hearing to a teacher under the facts in this case?

STATEMENT OF FACTS

The School Board adopts the statement of facts as set forth in the majority opinion of the Illinois Supreme Court, including its findings and its statements regarding the applicable law. App. I, pages 134 through 144 inclusive.

The letter written by the teacher was published on September 24, 1964, in the Lockport Herald, a weekly newspaper with an average circulation of 2,943. App. I, page 43. The letter was published shortly after the beginning of the school year and was in no way related to a labor dispute nor pending election of board members. (Board members are elected annually in the month of April. Chapter 122, Section 9-5, Illinois Revised Statutes, 1963.)

SUMMARY OF SCHOOL BOARD S ARGUMENTS

1. That there was sufficient cause for plaintiff's dismissal because the statements published by the teacher were false or made with utter disregard of the truth, to constitute falsehoods; that the false or misleading statements aimed at the Board of Education (elected officials) and the School Administrator (appointed official) were not constitutionally privileged, and that there was substantial evidence in the record to support the School Board's finding that they were false or misleading and detrimental to the interests of education and that the false statements were not remediable.

2. That the education of the youth of the nation is of great public concern and that acceptance of employment in the public school system creates an obligation on the part of the teacher to abide by reasonable legislation, regulation and rule which have been imposed and decreed necessary by the state to achieve its goals in education; that the teacher has an obligation of loyalty to support the generally accepted goals of education established by the Board of Education and the State; that the importance of education must yield to the unfettered, absolute and unrestricted constitutional rights that the plaintiff insists are his.

3. That the belated issue of fair hearing allegedly denied by Chapter 122, Section 24-12, Ill. Rev. Stats. 1963 should not be reviewed by this Court since it was not raised in the lower Courts; that the Illinois administrative procedure is very similar to the Federal procedure for dismissal of Federal employees with review provided for in the Courts; that if the Court reverses on this point, that the reversal be coupled with a remanding order for trial de novo in the Circuit Court of Will County. Illinois.

PREFACE

I. BRIEF ANALYSIS OF ILLINOIS SCHOOL MANAGEMENT AND FINANCE LAW.

In order to assist this Court in arriving at a decision on the important issues presented in this Appeal, we believe it is necessary to set forth and analyze the State of Illinois' scheme of school operation and management.

The Legislature in its judgment has determined that schools are best managed and operated at the local level and therefore provided for the establishment of school districts at county or lesser territorial areas. Article 9, Chapter 122, Ill. Rev. Stats. 1963.

The Legislature recognizing disputes could arise between different districts in matters of boundaries, annexations and de-annexations, created the office of County Superintendent of Schools and the County Board of School Trustees to solve these problems. Chapter 122, Articles 3 and 4, Ill. Rev. Stats. 1963.

The Legislature, recognizing that problems were arising that were state-wide in scope, created the office of State Superintendent of Public Instruction and School Problems Commission, and in 1961 that Commission promulgated the present Illinois School Code, which was adopted by the General Assembly and became law on March 18, 1961. While it is true that the present School Code retained many of the provisions of the former legislative acts, considerable time and study was made by that Commission to codify the law relating to schools. (See introduction to School Code 1961, page VII, Vol. 1, Ch. 122, Smith-Hurd Annotated Statutes.)

Except for certain types of state aid, high school districts are financed by local taxes levied on real estate and personal property located within the high school district. In order to control school finances, the General Assembly has established three basic funds; namely, the Educational Fund, Building Fund and Transportation Fund, providing by mandatory legislation amounts which high schools (any school district) could raise for those purposes. The said funds can be used only for the purposes intended and cannot be interchanged and cannot be commingled. Teachers' salaries are paid from the Educational Fund.

The Illinois Legislature, recognizing that school districts vary in population make-up as to social, economic, ethnic and religious background, provided that the maximum limits of taxation could be increased beyond the statutory limits imposed, by referenda conducted by the local school authorities. This method of school financing has created a great disparity in teachers' salaries, money available for educational purposes, school curriculum and school construction, throughout the State. Some school districts have little or no difficulty passing their proposed referenda, while others, like the defendant school district, have considerable difficulty as shown by the record in this litigation. In Illinois, school construction can only be financed by the issuance of building bonds; substantially, in conformance with a previously adopted plan by the School Board and approved by the legal voters in a referendum. It is illegal, in Illinois, to accumulate tax money out of any of the basic funds mentioned. Any savings effectuated by the Board must be passed on to the taxpayers by reducing its subsequent levy.

In its desire to obtain the best type of management for its schools, the Illinois General Assembly requires its board members to seek office on a non-partisan basis at an

election conducted solely for the purpose of electing school board members; that is to say, a school board election cannot occur on the day of a partisan election; and to further the purpose of obtaining dedicated persons to serve on its boards, board members are required to serve without compensation. The legal requirement for a person to be qualified to sit as a school board member is that he must be a legal resident of the district upwards of the age of 21 years.

School Board members are charged with the responsibility of maintaining proper records, *providing revenue to operate the schools,* adopt reasonable rules and regulations governing the operation of the district, inspect school buildings and facilities, hire and fix salaries of employees within certain minimum limits imposed by the legislature, (minimum salaries of teachers, see Ch. 122, Sec. 24-8, Ill. Rev. Stats. 1963) provide adequate and safe school buildings and facilities, provide for the safety of pupils, provide for the transportation of students, provide for the maintenance of school properties, provide for the discipline of students, conduct hearings for the suspension or dismissal of students and conduct hearings for the dismissal of teachers. The foregoing are some of the more important duties of the school board that can be found in more detail in Article 10, Chapter 122, Ill. Rev. Stats. 1963. The result of the duties thus imposed is that the Board of Education is constantly involved in matters arising out of the relationship between teacher and student, teacher and teacher, teacher with parent, teacher with administration, teacher with employing school board, teacher with teacher from other school districts, teacher with non-teacher employees, all of which will bring the quasi-judicial function of the School Board into opera-

tion. In addition, the Illinois School Board is faced with contract negotiations with teachers within the district, negotiations with other districts in limited areas of special education, scholastic and athletic competitions.

The paramount and most distasteful responsibility of the Illinois School Board is the calling upon the taxpayers of the district to vote on to themselves a raise in taxes, a most difficult task for a school district inhabited by a populace, a considerable part of which will receive no direct benefit from such an increase. The competition for the tax dollar among the multitude of taxing bodies (county, township, cities, drainage districts, sanitation districts, grade school districts, junior colleges, etc.) adds to the magnitude of defendant's difficulties to finance an adequate common school education for its high school students. The preparation necessary to convince the voters to pass a rate increase is evidenced by the documents cointained in the record. App. II, pages 10 through 15 inclusive; App. II, pages 17 through 39 inclusive.

In 1941 Illinois adopted its teacher tenure law. Chapter 122, Sec. 10-22.4 Ill. Rev. Stats. Its object is to improve the school system by assuring teachers of experience and ability, a continuous service based upon merit, and to prevent dismissals for reasons that are political, partisan or capricious. *Donohoo* v. *Board of Education,* 413 Ill. 422; 109 N.E. 2d, 787 (1952) at Page 789. As a companion measure, the Illinois legislature adopted Chapter 122, Section 10-22.4 which provides that the Board of Education can dismiss a teacher for incompetency, cruelty, negligence and to dismiss any teacher whenever, in its opinion, the interests of the schools require it. Chapter 122, Sec. 24-16, Ill. Rev. Stats. establishes the procedural rules for the hearing.

The decision of the Board is subject to administrative review as provided for in Chapter 110, Paragraph 264; and that decision will not be set aside unless it is without substantial support in the record or it is arbitrary, capricious or is manifestly against the weight of evidence. *Keyes* v. *Board of Education*, 20 Ill. App. 2d, 504; 156 N.E. 2d, 763 (1959). It has been held that where a statute is silent as to what constitutes cause and what is or is not remediable, the School Board has the power to determine such questions in the first instance and its decision in that regard is considered prima facie correct. *Jepsen* v. *Board of Education*, 19 Ill. App. 2d, 204; 153 N.E. 2d, 417 (1958).

The Illinois Practice and Procedures under its Administrative Review Act is not too materially different from the Federal Practice, particularly with regard to findings of the agency and the duty of the courts on review. *Batcholor* v. *U.S.* 1965, 169 Ct. Cl. 180; Certiorari Denied 86 S. Ct. 147; 382 U.S., 870; *Houston* v. *U.S.* 1962, 297 F. 2d, 838; Certiorari Denied, 83 S. Ct. 204; 371 U.S., 906.

ARGUMENT

I.

THERE WAS SUFFICIENT CAUSE FOR PLAINTIFF'S DISMISSAL UNDER THE ILLINOIS SCHOOL CODE.

A. THE PUBLISHED STATEMENTS OF THE TEACHER WERE FALSE OR RECKLESSLY MADE.

The majority of the Illinois Supreme Court, reviewing the evidence adduced at the trial, concluded that the statements published by the teacher were untrue and misleading and were detrimental to the best interests of education. App. I, pages 142 and 143. Accordingly, the Board of Education concurs with that Court and suggests the concurrence of this Court.

The accusations of the teacher were asserted as positive averments of fact and by twisted and tortured logic, hearsay and unbelievably strained interpretation, a change of plans by the School Board became a breach of promise (App. I, pages 138 and 139); an expensive non-regulation track fell out of the sky (App. I, pages 48 and 138; App. I, page 102); a speech by the school administrator to the teachers to support the referendum was a threat and insult to the voters (content of the teacher's letter). Letters written by a group of five or six teachers appointed by the executive board of the union in support of the rate increase (App. II, page 13) became a sinister conspiracy to bilk the taxpayers; a school policy requiring submission of the printed material to the school coordinator in triplicate prior to publication, for purposes of accuracy (App. I, pages 105 and 106) constituted censorship and totalitarianism for the teachers and students; a $40,000.00 error

(App. I, page 142) in estimating transportation costs attributable to the athletic department is viewed as mere inflation, teacher's brief, page 64.

A capital expenditure, $111,558.00 for a tennis court and football field is stated to be a yearly expense (App. I, pages 108, 109, and 141); architectually designed classrooms without doors, a plant room without sunlight and a first-aid room without water to save money, became a fraud to the taxpayers (App. I, pages 49 and 50); and then with a puerile conclusion, the teacher is no longer writing his letter as a teacher, but as a voter and taxpayer, taking a final swipe at the administrator, implying that he operates a prison.

The Illinois Supreme Court went on to say, "Other statements and charges made in plaintiff's letter could reasonably have been found to be untrue and misleading." (App. I, page 142) The Court found from the record that the teacher never made a formal or informal protest or report to any of his superiors about the subject matter of his accusations and charges (App. I, page 142) although, the teacher attended many board meetings prior to writing and publishing his letter (App. I, page 100).

Justice Shaefer in his opinion points out the inaccurate statements of the teacher (App. I, page 151), and goes on to say that the letter need not be a model of literary style, good taste and sound judgment. However, in *Krennrich* v. *U. S.*, 340 Fed. 2d 653 at page 654, a dismissed Federal employee contended that the Civil Service Commission could not dismiss her without first proving that the statements she published in an anonymous letter were in fact false. The letter in question was sent to a superior and to the wife of a fellow employee. In sustaining the dismissal of the public employee the Court held that the truth or falsity of the letter was not in issue, but the

efficiency of the Federal service was, Certiorari Denied 86 S. Ct. 147; 382 U.S. 870.

The false and inaccurate statements made by the teacher cannot be justified by pointing to one or two inaccurate statements made by the Board or the administrator out of the maze of material prepared and distributed in support of the referendum. App. II contains said materials.

The Board of Education contends that the teacher by virtue of his public employment has a duty of loyalty to support his superiors in attaining the generally accepted goals of education and that, if he must speak out publicly, he should do so factually and accurately, commensurate with his education and experience.

B. THAT THE STATEMENTS WERE NOT REMEDIABLE.

Plaintiff made his unwarranted false charges to the public at a time when the district was having severe growing pains. It had just built two new high schools and was already operating one. It early recognized the need for a higher tax rate for educational and transportation purposes because of this building program and put the matter to the public twice. The propositions for the tax rate increases were defeated twice. It is common knowledge that in Illinois, many school districts were and are presenting such proposals to the voters and with little success. The public does not agree easily to having its taxes increased. To say that the best interests of the schools and of the children of the district would not suffer by dissemination of such false accusations and statements to the public by a teacher of the district during these critical and crucial times is contrary to common sense. Plaintiff's accusations were not conducive to the proper and efficient education of the children of said district.

In *Jepson* v. *Board of Education,* 19 Ill. App. 2d, 204; 153 N.E. 2d, 417 (1958), the teacher dismissed stated orally to other teachers in the employing school and to coaches in athletically competing schools that one of the student football players was ineligible. In sustaining the Board of Education, the Court found such oral statements to be without remedy.

The continued employment of Marvin Pickering in District 205 would give substance and credence to the false charges made in his publication.

C. FALSE STATEMENTS KNOWINGLY OR RECKLESSLY MADE ARE NOT CONSTITUTIONALLY PRIVILEGED WHEN THE STATEMENTS PUBLISHED CAN BE REASONABLY SAID TO BE DETRIMENTAL TO THE BEST INTERESTS OF SCHOOLS.

It has been pointed out earlier in this brief that school boards are composed of elected officials, but only in the narrowest definition of the word elected. Under the Illinois scheme, Board members receive no salary, are non-partisan, and are very limited in financial authority. Raising sufficient revenue to operate its school system is the most vital of its statutory duties, and the most consuming of its energies. The Board of District 205 has determined that an athletic program and competition is desirable and worthwhile. The advantages for the student participants in such a program need not be discussed, except to say that vibrant and youthful energies are diverted to such acceptable virtues as reliability, citizenship, obedience, discipline, sportsmanship, loyalty and cooperation. Raising tax monies for the athletic program was one of the policies of the board for the benefit of the students in the district.

A responsible, intelligent, and factual debate or public statement opposing the school board's expenditure of tax monies for athletics on the theory that the money spent is not justified and would be more beneficial to the students if applied to the more academic offerings of the school, certainly would be constitutionally privileged—but a reckless, childish, inaccurate, irresponsible, pointless and incoherent publication by a teacher in opposition of legitimate Board policy certainly cannot be privileged. The school policy with respect to band, choir, dramatics, debate competition, and maybe its science programs, could be subjected to the same type of publication. The Board of Education has the responsibility of budgeting, pro-rating and determining the order of the priority of the available tax monies. The Board and the Administrator ought to be entitled to the intelligent cooperation of the teachers in arriving at a decision as to how the money is best used.

It, therefore, must be concluded that all of the cases cited by the teacher relating to libel for money damages, criminal libel, obscenity, and loyalty oaths, are not applicable. The teacher quotes frequently and freely in the abstract from these cases without relating them to facts of the quoted cases or to the facts of the case at bar, all of which tends to confuse the real issue.

The Illinois Court concluded that principal cases relied upon by the teacher were not applicable, (App. I, page 142) and the Board solicits the concurrence of this Court.

In support of the Illinois decision, we quote *Houston* v. *U. S.*, 297 Fed. 2d 838 (1962), Certiorari Denied, 83 S. Ct. 204; 371 U.S. 906, at page 841:

> "But whether the facts in this case bring it within the privilege, as above defined, we do not need to decide. The action before the Commission was not

> one for slander or libel, but one to determine whether or not plaintiff's discharge promoted the efficiency of the service. The question is, was the Commission, in such a proceeding, justified in saying that the employee's inability to sustain the grave charges he had made against his superior justified his dismissal."

The majority of the Illinois Supreme Court, and the defendant Board of Education, can see no reason why the Federal standard cannot be applied to state public employees.

II.

CHAPTER 122, SECTION 10-22.4, ILLINOIS REVISED STATUTES (1963), WHICH PROVIDES THAT A BOARD OF EDUCATION MAY DISMISS A TEACHER WHENEVER IN ITS OPINION THE BEST INTERESTS OF SCHOOLS REQUIRE IT, IS NOT UNCONSTITUTIONAL AS BEING VAGUE AND INDEFINITE WHEN APPLIED TO FIRST AMENDMENT RIGHTS.

The teacher in his brief relies heavily on this Court's recent decision in *Keyishan* v. *Board of Regents,* 87 S. Ct., 675 (1967), in which this Court declared unconstitutional New York's Feinberg law, and several administrative rules and regulations, all aimed at the extraction of a loyalty oath from public employees in the State of New York's public school system. On the contrary, the defendant contends that this case supports the position of the School Board in the case at bar. The *Keyishian* case affirms the prior decision of this Court, which have held that public employment which may be denied altogether, may be subjected to any conditions regardless of how unreasonable, has been uniformly rejected. The Court, by this statement, affirms that the state may place reasonable restrictions and conditions on public employment. This Court in striking down the State of New York's attempt

to extract non-communistic loyalty oaths from its public school teachers by a maze of administrative regulation, ruled that the best interests of education and academic freedom are best served when teachers are not required to submit to a loyalty oath, which could be violated when the teacher delivered a lecture to his students on communism. The requirement of a loyalty oath does not bear any reasonable relationship to a person's efficiency, competency or ability to carry out his teaching responsibilities.

The attack on the Illinois statute must necessarily constitute an attack on fifty similar statutes, as the several states and Congress have couched their tenure statutes in what appears to be on first examination vague language. Congressional legislation provides that Federal employees can only be dismissed for "such cause as promotes the efficiency of the service". Title 5, U.S.C.A., Sec. 7501 (Competitive Service); Title 5, U.S.C.A., Sec. 7512 (Preference Eligibles). It has long been recognized that relationships which can give rise to many different factual situations must be regulated in general language. Millions of dollars of personal injury judgments are sustained on the Reasonable Man Doctrine of Negligence Law. Pecuniary conflicts of interests laws, malfeasance and nonfeasance laws and regulations of innumerable administrative agencies are couched in the broadest of language. To declare the Illinois statute in question unconstitutional in its application or otherwise, would only serve to confuse or make irreconcilable all of the other legal doctrines so firmly established in the judicial test of reasonableness.

In sustaining a dismissal of a First Assistant to the Assistant United States Attorney General in charge of Civil Division, the United States Court of Appeals for the District of Columbia held:

"Congress did not attempt a definition of 'cause', providing only that it must be one that would promote the efficiency of the service. Some latitude was thus left to those responsible for administering the Act. Faithfulness to its purpose to reward those who served in the armed services by granting a protective preference must be maintained. But the preference granted does not protect a veteran in a position when removal therefrom, viewed in the light of competing policies and all the circumstances, can reasonably be said to lead to increased efficiency in highly placed governmental operations." *Leanard* v. *Douglas,* 321 Fed. 2d (1963), 749, at page 752.

To conclude our argument on this issue we cite *Board of Education* v. *Swan,* 41 Cal. 2d 546; 261 P. 2d 261, Cert. denied, 347 U.S. 937, 98 L. Ed. 1087; 74 S. Ct. 627 (1954), on page 266 of Pacific Reports, 2nd Series:

The fact that the term "unprofessional conduct" is not defined by statute authorizing the dismissal of a teacher . . . does not render it void for uncertainty. As was said in the Goldsmith case . . . ". . . the calling (of a teacher) is so intimate, the duties so delicate, the things in which a teacher might prove unworthy or would fail are so numerous, that they are incapable of enumeration in any legislative enactment . . . the teacher is entrusted with the custody of his children and their preparation for useful life. His habits, his speech, his good name, his cleanliness, *the wisdom and propriety of his unofficial utterances,* his associations are all involved. His ability to inspire children and to govern them, his power as a teacher and the character for which he stands are matters of major concern in a teacher's selection and retention. How can all of these things be provided for and offenses against them be particularly specified in a single statute? It was further said, . . .: "No one has a natural or inherent right to teach a public school" and the Legislature "for reasons of public

policy" may make the right to teach in any particular school subject to broad discretion in the school authorities to dismiss for causes which come within very general designations."

III.

THE HEARING AFFORDED THE TEACHER DID NOT VIOLATE DUE PROCESS.

A. ISSUE NOT RAISED IN LOWER COURTS.

It is most interesting to note that in the complaint for administrative review the teacher raises constitutional matters in two separate paragraphs, 17-L and 17-M, App. I, page 7. The board filed a motion to strike or in the alternative make more specific paragraphs 17-L and 17-M of the complaint, App. I, page 29. The board's motion with regard to paragraph 17-M was denied, App. I, page 30; but the teacher was ordered to make paragraph 17-L more specific. App. I, page 30. Teacher's paragraph 17-L alleged:

> "The plaintiff was deprived of his property and personal rights without due process of law in violation of the Constitution of the United States of America and Section 2 of Article II of the Constitution of the State of Illinois, App. I, page 7.

The teacher's specification is found in App. I, pages 32 and 33:

> Paragraph 17(i)
>
> It appears from said charges, and said administrative decision, that the defendant acted arbitrarily, capriciously and from reason of bias or personal hatred and without warrant of law.
>
> **SPECIFICATION**
>
> 1. The Teacher Tenure Law states that the plaintiff may only be deprived of his contractural rights (continued contractural service) by the procedure provided by law. This is a substantial right (*Donahoo* v.

Board of Education, 413 Ill., 422). The procedural and, consequently, "due process" rights of the plaintiff were violated at least in the following respects.

a. The specification made above with respect to paragraph 17(i).

b. The failure to give the jurisdictional remedial notice.

c. The fact that findings were made against plaintiff that were not based on the charges.

d. The fact that findings were made against plaintiff that were not supported by substantial evidence.

2. The plaintiff was deprived of his salary (property) and his personal rights (to follow his chosen profession) by this denial of "due process."

3. It is not alleged in the charges that the best interests of the schools required that the plaintiff be dismissed and no evidence was introduced on the point. Such evidence would have to show that the schools were in some way damaged. Without such charges and evidence, there could be no basis for the specific finding in the decision that the best interests of the schools required that plaintiff be dismissed.

4. There is no presumption that the charges are true.

From this state of the pleadings, the teacher now argues that he raised the issue of the constitutional propriety of the board to act as a tribunal. An examination of the teacher's brief in the Illinois Supreme Court indicates this issue was not raised or argued to that court. Justice Schaefer's comments on this point cited no cases and were rendered more or less to support his statement that:

"The unseemliness, if not the unconstitutionality, of this procedure reinforces my doubt that the General Assembly intended that it should apply to the exercise of first amendment rights".

The charge of the Amicus Curiae of page 11 of his brief concerning the dual function of Mr. Louis Bertani as prosecutor and attorney for the board is completely false and unwarranted. Neither Justice Schaefer nor the majority of the Illinois Court discussed this point in their decisions. It was not raised in the teacher's brief to the Illinois Supreme Court. The teacher's brief in this court does not comment on this point as it relates to Mr. Bertani. The teacher was apparently satisfied in his hearing before the board and all the rulings in the admissions and exclusions of the evidence were proper since his complaint for administrative review failed to request a review on matters of admissions and exclusions of evidence.

Therefore it is requested that this issue not be considered by the Supreme Court of the United States in accordance with its ruling under the *Keyishian* case and the *Adler* case.

B. THE TEACHER WAS ACCORDED A FAIR HEARING.

The majority of the Illinois Supreme Court in its opinion discusses the purpose of the Illinois Teacher Tenure Law and the functions of the court on review: App. I, pages 143 and 144. The indication of the court is that the teacher was accorded a fair hearing. To quote the Illinois Supreme Court:

> "There is nothing in the record before us to indicate malice on the part of the board members toward the plaintiff, nor does it appear that the board's action was impulsive or capricious. The administration of the schools is within the domain of the school board, and courts do not interfere with the exercise of its powers unless it is shown to be capricious or arbitrary." App. I, page 44.

In sustaining the constitutionality of the State of New York Mental Hygiene Act which provided for the tempo-

rary restraint of alleged mentally incompetent persons without notice and hearing, the ultimate appeal court of the State of New York discussed and analyzed the requirement of due process.

Due process is not susceptible of precise legal definition. Due process of law requires an orderly proceedings *adapted to the nature of the case* in which the citizen has an opportunity to be heard and to defend, enforce and protect his rights. A hearing or an opporunity to be heard is absolutely essential. *In Re: Coates,* 9 N.Y. 2d 242, 173 N.E. 2d, 797. Due process does not, however, guarantee to the citizen of a state any particular form or method of state procedure, *Dohany* v. *Rogers,* 281 U.S. 362, at 369, 50 S. Ct. 299, (1930).

The Illinois pattern of administrative procedure provides for a hearing before the administrative board with review to the Circuit Court and review to the Appellate and Supreme Court. Complaints in many instances are initiated by the administrative agency on its own motion, then subsequently heard by the initiating board. Police and fire boards, liquor control boards, zoning boards, commerce commissions, licensing agencies insurance and banking control agencies, etc. . . . all follow a like procedure because these boards and agencies are adapted to the nature of the case.

Now, the teacher is demanding that the State of Illinois create a new hearing agency because the procedure afforded him might have been unfair.

It would be preposterous for a lawyer to release contemptuous public statements concerning the Supreme Court of Illinois and then argue that he should go without punishment because the State of Illinois has not provided him with an unbiased tribunal. It would be even more

preposterous if this court would declare chapter 122, section 24-12 unconstitutional before the Illinois Supreme Court had an opportunity to fully explore that issue in its own court.

The dismissal action of the defendant board in this case can be sustained on the false and misleading statements directed to the school superintendent who is not an elected official, App. I, page 66, nor a member of the board of education sitting as a hearing agency, App. I, pages 20 and 21. We conclude the teacher in this case was afforded a fair hearing.

CONCLUSION

1. That the statements of the teacher were false and misleading and were detrimental to the best interest of schools. That there was substantial evidence in the record to support the findings of the board of edueation and that the conduct of the teacher was without remedy.

2. That Chapter 122, Section 22.4 is not unconstitutionally vague and indefinite.

3. That the teacher was afforded a fair hearing. If the case is to be reversed on this point then there must be a remandment order for trial de novo in the Circuit Court of Will County, Illinois.

The judgment of the Illinois Supreme Court should be affirmed.

Respectfully submitted,

JOHN F. CIRRICIONE
CIRRICIONE & PENN
32 West Van Buren Street
Joliet, Illinois 60431